Supreme Court, U.S.
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No. 08-237

In The
Supreme Court of the United States

JARROD WILLIAM MESSER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Clermont County

BRIEF IN OPPOSITION

DAVID H. HOFFMANN
Counsel of Record
ASSISTANT PROSECUTOR FOR
CLERMONT COUNTY, OHIO
123 NORTH THIRD STREET
BATAVIA, OHIO 45103-3033
(513) 732-7313

Counsel for Respondent

October 23, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

OMISSIONS PURSUANT TO RULE 24(4)

Respondent is satisfied with Petitioner's Questions Presented, Opinions Below, Jurisdictional Statement, and Constitutional and Statutory Provisions Involved, et al., and, under Rule 24(2), exercises its option to omit same. Pursuant to Rule 15(3), Respondent further opts to omit a Summary of Argument.

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BRIEF FOR RESPONDENT, THE STATE OF OHIO, IN OPPOSITION

Respondent, the State of Ohio, prays that Petitioner's Petition for Writ of Certiorari to review the judgment and opinion of Ohio's Twelfth District Court of Appeals be denied. The opinion affirming Petitioner's sentence was entered November 5, 2007, in *State v. Messer*, No. CA2006-10-084 (Ohio 12th Dist., Nov. 5, 2007).

STATEMENT OF THE CASE

On September 22, 2004, the Clermont County Grand Jury indicted Petitioner Jarrod Messer under Ohio's RICO statute, Ohio Rev. Code Ann. § 2923.32(A)(1). The dates of the predicate offenses range from June 2002 to April 2003.

On September 30, 2004, while the warrant on indictment was outstanding, the case was called for arraignment. In an entry filed on that date, the matter was continued pending service of the indictment, the entry indicating that the warrant had been entered in the National Crime Information Center ("NCIC"), a computer data bank.

The pending indictment was entered into the NCIC databank sometime between September 22 and September 30, 2004. In November 2004, Clermont County Officials were notified by counsel of Messer's incarceration.

Messer was arrested on the warrant on indictment December 15, 2004. He remained incarcerated, but

not solely on that charge. On December 16, 2004, the following day, Messer, pro se, waived his right to a speedy trial and continued his court date to December 30, 2004. Beginning January 7, 2005, eight days later, the case was continued by entries to April 8, 2005, speedy-trial time being waived. On May 10, 2005, 32 days later, and with 40 days of cumulative elapsed speedy-trial time, the pretrial was continued to May 26, 2005, and a "blanket" time waiver was filed. This waiver was not withdrawn prior to the filing of the motion to dismiss on speedy-trial grounds on July 28, 2006.

On August 3, 2006, the motion to dismiss was heard and taken under advisement. On August 11, 2006, a combination decision - judgment entry was filed denying the motion. The same day, Messer entered a plea of no contest to the amended charge of attempted engaging in a pattern of corrupt activity under Ohio Rev. Code Ann. §§ 2923.02(A) and 2923.32(A)(1). On September 28, 2006, the trial court sentenced Messer to serve five years of community control. The Court of Appeals for Clermont County affirmed, holding that the speedy trial deadline should be calculated using the date of arrest for the RICO charge, not the date of arrest for the latest predicate offense. *State v. Messer*, No. CA2006-10-084 (Ohio 12th Dist., Nov. 5, 2007) The Supreme Court of Ohio declined jurisdiction. *State v. Messer*, 117 Ohio St.3d 1458, (2008). A petition for certiorari was timely filed in this Court, after an extension, on August 21, 2008.

ARGUMENT AGAINST GRANTING CERTIORARI

Certiorari should not be granted, because Sixth Amendment speedy trial rights are not recognized to apply to pre-indictment delay.

I. Introduction

Petitioner Jarrod Messer claimed only that his speedy trial right listed in the Sixth Amendment, and protected in Ohio Rev. Code Ann. §§ 2945.71 et seq., which were intended to codify that right, was violated by the pre-indictment delay in this case. He now adds, too late, a due process claim based upon the Fifth Amendment.

Pre-indictment is the proper term, because Messer is attempting to include the time prior to the filing of the instant RICO indictment in a Sixth Amendment analysis. He seeks to have the speedy-trial time run from the time of the indictments or convictions involved in the predicate offenses. Again, this claim is leveled against the RICO indictment in terms of the Speedy Trial Clause of the Sixth Amendment, not the Due Process clause in the Fifth Amendment, which protects against pre accusation delay.

II. The speedy trial right listed in the Sixth Amendment does not protect against pre-indictment delay.

The Speedy Trial Clause of the Sixth Amendment, which lists certain rights of the "accused," protects against post-accusation delay. *United States v.*

Valenzuela-Bernal, 458 U.S. 858, 868, (1982). Ohio has codified that right by enacting the speedy trial statutes in Ohio Rev. Code Ann. §§ 2945.71 et seq. *State v. Parker*, 113 Ohio St.3d 207, 209, (2007). The Due Process Clause of the Fifth Amendment, on the other hand, lists the right of a "person" to due process, and therefore has been interpreted to include the right against pre-accusation, or pre-indictment delay. *United States v. Macdonald*, 456 U.S. 1, 7, (1982). This right has been codified in Ohio by the enactment of the statute of limitations in Ohio Rev. Code Ann. § 2901.13. See *United States v. Marion*, 404 U.S. 307, 322-23, (1971).

By choosing to plead the Sixth Amendment Right below, Messer should be considered to have waived his right to raise a Fifth Amendment Claim before this Court.

Further, the Sixth Amendment Claim was properly disposed of by the trial court and the court of appeals. Messer sought to apply a line of Sixth Amendment cases to his pre-indictment delay in this case. The cases; *State v. Adams*, 43 Ohio St.3d 67, (1989) and *State v. Homan*, 89 Ohio St.3d 21, (2000), both require that the trial deadline in related, but sequential, prosecutions be based upon the file date of the earliest prosecution. Here, however, the prosecutions of the predicate offenses are more akin to the materialization of the elements of the offense, not the first of several related sequential prosecutions. The cases are not apposite. The petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that the Petitioner has failed to raise an issue deserving of review by this Court. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

David H. Hoffmann (0005384)
Counsel of Record
Assistant Prosecutor for Clermont County, Ohio
123 North Third Street
Batavia, Ohio 45103-3033
(513) 732-7313

Counsel for Respondent